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No. 83-1918

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT B. EUBANK, PETITIONER
INDIVIDUALLY AND ON BEHALF OF ALL OTHER
SHAREHOLDERS OF LEE LUMBER COMPANY, LTD.

VS.

LEE LUMBER COMPANY, LTD., RESPONDENT

VS.

INTERNATIONAL PAPER COMPANY, RESPONDENT

RESPONSE OF PETITIONER, ROBERT B. EUBANK, TO MOTION FOR DAMAGES OF RESPONDENT INTERNATIONAL PAPER COMPANY

ROBERT B. EUBANK
Attorney at Law
Suite 203
15 Office Park Circle
Birmingham, Alabama 35253
Telephone: (205) 324-9217

MAY IT PLEASE THE COURT:

Respondent International Paper Company, ("International"), on June 8, 1984 moved to impose $50,000 damages against petitioner under Rule 49.2, arguing that the instant petition for certiorari is "frivolous." Petitioner received the motion June 11, 1984. International's motion, and brief in opposition to the petition, show substantial agreement as to what occurred below, and that the petition is not frivolous.

The questions for review fall into two broad categories, substantive and procedural.

The Substantive Question. The substantive issue is whether the Lee II decision, dismissing that suit for prescription of the "action of nullity or rescission," is res judicata to the instant Lee III action stating the "possessory" cause of action.

The parties seem to agree:

> (1) That, unless all of Lee's causes of action are barred by prescription of the "action of nullity or rescission" (or by res judicata, i.e., a prior dismissal of an entire claim solely for prescription of the "action of nullity or rescission"), the Lease in question is void. International draws no distinction between a previous, affirmed decision of the District Court below, L. L. Brewton Lumber Co. v. Continental Can Co., Inc., D.C., W.D.La., No. 14680, 480 F.2d 923 (5th Cir. 1972), which voided a lease with the same consideration as the present Lease, and this case, save to assume that in Brewton the issue of prescription must not have been raised. International's Brief, pp. 2, 12.
>
> (2) That Lee I, the original suit to cancel the Lease, was dismissed in the Louisiana courts solely on prescription of the "action of nullity or rescission" (i.e., as to the issue whether the Lease is void; another issue, whether it had been breached by International, was tried and lost by Lee).
>
> (3) that Lee II was dismissed by the District Court below solely for prescription of the cause of action of "nullity or rescission," although Lee II specifically attempted to state a "possessory" cause of action and several others;
>
> (4) that Lee III specifically confined itself to asserting the possessory cause of action, and that it was dismissed solely on the grounds that Lee II was res judicata.

As Justice Holmes said, on many points of law "a page of history is worth a volume of logic." Before the Federal Rules of Civil Procedure adopted the unified, single form of civil action in 1938, no one doubted that the prescription of one cause of action - e.g., "nullity or rescission" - did not bar the bringing of another - e.g., a "possessory action". Statutes of limitations bar only their recited "causes of action", not lawsuits in

general.

Nor did anyone doubt, in 1938, that the Federal Rules did not change this. Adoption of a single form of civil action meant merely that causes of action need not be specifically pleaded, not that the prescription of one cause of action arising from a given set of facts now barred any other cause of action present therein. If before 1938 the prescription of the "action of nullity or rescission" did not bar the "possessory action," or other available causes of action, it did not after 1938 either.

Similarly, before 1938 a judgment rendered solely upon one cause of action, was not res judicata to the subsequent bringing of another. Under writ pleading, a prior adverse judgment on one cause of action (e.g., that it did not lie, had prescribed, or that there was a valid defense to it) did not bar the subsequent bringing of another. The penalty for choosing an unviable cause of action from among several available, was delay of justice until a viable cause of action was pursued - not denial of justice forever. In short, there was no compulsory joinder of causes of action. The 1938 Federal Rules did not change this either. The single form of action merely meant that, if the identity of the cause of action became crucial, a plaintiff should be free to argue the existence of any cause of action supported by the facts pleaded. It did not mean that a judgment dismissing a claim in which there lay several causes of action, solely on the grounds of the prescription of (or unavailablity of, or existence of a defense to) one cause of action, was res judicata to subsequent other causes of action.

Since 1938, cause-of-action issues have been, mercifully, of less frequency and importance. But they are still central to the issues of prescription and res judicata.

Although the United States Supreme Court has not recently entertained a petition for certiorari on a similar question of res judicata, the Fifth Circuit has. See **Nilsen v. City of Moss Point, Mississippi**, 701 F.2d 556 (5th Cir. 1983) (en banc). Issues which occasion en banc appellate hearings are not

frivolous for certiorari.

The Procedural Questions. The procedural questions, the first three, ask essentially whether the Fifth Circuit properly affirmed without opinion under Local Rule 47.6.

Both parties agree that Local Rule 47.6 requires that the affirmed judgment be "based on findings of fact which are not clearly erroneous; that the instant judgment was upon a motion to dismiss, converted to a motion for summary judgment under Rule 56, FRCP; and that under Rule 56(c) summary judgment issues only where "there is no genuine issue as to any material fact." International's Brief, page 6.

If there was "no genuine issue as to any material fact" below, how could the District Court judgment have been based "on findings of fact," clearly erroneous or not? How could this have been the "dispositive" issue on appeal, so as to invoke Local Rule 47.6?

International sees factual issues in whether International's acts were a "disturbance" under Louisiana law, and whether the action had prescribed. These are issues of law, not of fact. There is no factual dispute as to what International's acts were upon the subject property, or as to when the suit below was brought.

The Supreme Court has twice granted petitions for certiorari on decisions by Court of Appeals below without grounds or opinions, and remanded to the courts below for an opinion stating grounds. Taylor v. McKeithen, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972); Northcross v. Board of Education, 412 U.S. 427, 37 L.Ed.2d 48, 93 S.Ct. 2201 (1973). This petition is to obtain review of almost the same question as was involved in Taylor and Northcross. Here, either the grounds for decision were lack of clear error in (non-existent) findings of fact below - a non sequitur - or else the grounds are not revealed. The petition is not frivolous, and should in fact be granted.

International, urging that the petition is frivolous, relies heavily on the "ten years" of prior "litigation" over the matter.

But prior litigation does not mean frivolity. Every case for which a petition is filed has been both tried and appealed at least once. And the "ten years" of "litigation" between International and Lee might better be described as ten years of "non-litigation." It amounts to three dismissals, the first two grounded solely upon prescription of a cause of action not urged ("nullity or rescission"), and the present upon res judicata, even though it states a different cause of action ("possessory action") than that held stated before. Issues of prescription and res judicata are prone to give rise to repeated non-litigation. See **Nilsen** (supra), the last in a series of four civil actions.

The issues raised are important not only to the present parties but also to the administration of justice in general; the maintenance of a balance between the need to cope with the modern "flood of litigation" and the need for open, reasoned, scholarly and professional disposition of cases by the Courts of Appeals. International is not alone in feeling "harassed" or displeased by the erratic course of the matter. Petitioner does also, and Lee, and (one suspects) so also do the District Court and the Court of Appeals for the Fifth Circuit. Disposition with neither opinion nor grounds has been a service neither to the litigants nor the courts.

Accordingly International's motion should be overruled.

Robert B. Eubank
Suite 203
15 Office Park Circle
Birmingham, Alabama 35223
(205) 324-9217

CERTIFICATE OF SERVICE

I, do hereby certify that on the _____day of June, 1984, copies of the Response to the Motion of Damages, were mailed in duly addressed envelopes, with postage prepaid, to:

Richard L. Crowell
Crowell, Owens & Tudor
Counsel for Lee Lumber Company, Ltd.
P.O. Box 330
Guaranty Bank & Trust Company Building
Alexandria, Louisiana 71309

David I. Garrett, Jr.
Merwin M. Brandon, Jr.
Counsel for International Paper Company
Madison, Garrett, Brandon, Hamaker,
Wilson, Tugwell & Rhymes
1406 Royal Avenue
Monroe, Louisiana 71207

I further certify that all parties required to be served have been served.

Robert B. Eubank